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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. .....

JOHN R. ENGLE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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JOHN R. ENGLE,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

John R. Engle petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause on May 2, 1972.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is reprinted as Appendix I annexed hereto.

JURISDICTION

Petitioner was convicted in the United States District Court for the Eastern District of Missouri in three Counts of violating 28 U.S.C. § 7206(1). Judgment was entered on October 1, 1971. The judgment was affirmed by the United States Court of Appeals for the Eighth Circuit on May 2, 1972. On May 24, 1972, this Court entered an Order granting Petitioner an extension of time, to July 1, 1972, within which to file his Petition for a Writ of Certiorari. The jurisdiction of this Court is under 28 U.S.C. § 1254(1). The District Court had jurisdiction under 18 U.S.C. § 3231.

QUESTIONS PRESENTED

1. Whether, under Sec. 7206(1), the government may indict a person for failure to report a certain sum as "total income" on Page 1 of a tax return, and then seek to justify a conviction on proof that, although "total income" on Page 1 may or may not have been correct, yet the return on **other** pages or in **other** respects was incorrect.[1]

2. Whether the use of the term "kickback" by a government agent, in testimony in the presence of the jury, to describe payments to Petitioner by a supplier of the company employing Petitioner was so inflammatory as to constitute prejudicial error under Rule 52(b) of the Federal Rules of Criminal Procedure.

---

[1] On Form 1040 for the years 1965, 1966 and 1967, Line 9, Page 1 of said return is entitled as "total income". The amount to be inserted therein is the result of a mathematical calculation which includes the forwarding of receipts reported elsewhere on the return after reducing same by allowable expenses and deductions. At no other place in entire return is the term "total income" used. (See Appendix II attached). The returns for each of the years in question are the same.

3. Whether a taxpayer who is subject of a criminal tax investigation is entitled to advice as to his rights under **Miranda v. Arizona**, 384 U.S. 436 (1966), and **Mathis v. U.S.**, 391 U.S. 1 (1968), in a non-custodial interrogation and, if so, the extent of such advice.

STATEMENT OF THE CASE

Petitioner was tried in the United States District Court for the Eastern District of Missouri and found guilty by a jury on each of three counts for the years 1965, 1966 and 1967 of the indictment for violating Sec. 7206(1), 26 U.S.C. § 7206(1). The judgment was entered on October 1, 1971, at which time a sentence of one (1) year was imposed upon Petitioner on each count, to run concurrently, and he was fined $5,000.00. The judgment of conviction was appealed to the United States Court of Appeals for the Eighth Circuit which affirmed such judgment on May 2, 1972.

1. Facts Relating to Government's Burden of Proof Necessary to Sustain a 7206(1) Violation in the Manner as Charged.

Petitioner, during the years of the Indictment, was President of Steak N Shake, a drive-in restaurant chain with outlets in several mid-western states and Florida. Petitioner had been employed by Steak N' Shake for a number of years in Illinois, and in the late 1940's he moved to the St. Louis area to take charge of the company's expansion into that territory. In developing the St. Louis territory into the most successful phase of the company's operation, Petitioner followed a pattern of business promotion set by his predecessor as President, whereby substantial expenditures were made in entertaining employees, customers and suppliers. To avoid conflict with the home office in Bloomington, Illinois, and with

certain company officials with respect to the amount and frequency of the entertainment expenditures being made in the St. Louis area, Petitioner's predecessor, as President, arranged for one of the company's suppliers, American Vending Company, who would be benefited most by expansion activities, to furnish Petitioner with a monthly cash allowance. This payment was used and treated by Petitioner from its inception, and during the years in question, as a reimbursement for the substantial and continuing expenditures being made by him in promoting the company's growth in the St. Louis area. Petitioner did not otherwise seek or receive reimbursement for these particular expenditures from his employer, Steak N' Shake.

The payments to Petitioner from American Vending totaled $3,897.48 for 1965, $4,400.09 for 1966, and $2,119.00 for 1967. It is the receipt and proper reporting of these sums that form the basis of the within controversy.

Under a prior four-count indictment, covering the years 1964 through 1967, Petitioner was alleged to have violated 26 U.S.C., § 7206(1), by subscribing returns which were not true and correct as to every material matter "in that said income tax return reported **taxable income** in the amount of ..... for the year ...., whereas . . . correct **taxable income** for the year .... was ....." (our emphasis) (App. III). The prior indictment was voluntarily dismissed by the government and Petitioner was charged and convicted under the subject superceding indictment which alleged that Petitioner subscribed to returns which were not true and correct as to every material matter "in that said income tax return reported **total income** in the amount of ..... for the year .... whereas . . . the correct **total income** for the year .... was ....." (our emphasis) (App. IV).

At trial under the latter indictment the government's proof showed only the non-reporting of receipts of the

above described monthly sums by Petitioner. The government addressed its proof to a showing that the receipts from the supplier were not reported by Petitioner any place on Page 1 of Form 1040. During the trial the government offered no proof of incorrectness in the returns except with reference to the omission of these items from page 1 of the returns. As a matter of fact, the Intelligence Division Special Agent handling the investigation, and one of the chief prosecution witnesses, testified that he was not qualified to state **where** on the return these sums should be reported. The Assistant U. S. Attorney objected to any line of inquiry by the defense as to how and where these sums should have been reported (App. V).

The differences in the reported "total income" on Petitioner's return and the alleged correct "total income" was the exact amount Petitioner received from the supplier, American Vending Company.

2. Facts Relating to the Use of the Word "Kickback" by the Special Agent.

There was no dispute whether Petitioner received the payments in the amounts alleged from the American Vending Company. The owner of the company testified as to making the payments and Petitioner, at all times, ackowledged receipt thereof. The Special Agent of the Internal Revenue Service Intelligence Division testified for the government and generally outlined his investigation. On cross-examination the Agent acknowledged contacting other suppliers of Petitioner's employer as to possible payments to Petitioner and that he found no evidence of same.

On redirect examination the Assistant United States Attorney asked:

"Q. What did you ask them (other suppliers of Steak N' Shake) if they gave money to Mr. Engle personally? Is that the sort of questions you asked them?

A. Yes, sir. If they gave kickbacks to him, commissions."

Petitioner's trial counsel objected to the answer and requested that it be stricken, the jury instructed to disregard same, and that a mistrial be declared. The Court granted all the relief requested except for the mistrial which, after a recess and argument by both counsel outside the presence of the jury, was denied.

3. Facts Relating to Statements Made by Petitioner to the Special Agent of the Intelligence Division of the Internal Revenue Service.

The Special Agent, Gill Lewis, was assigned Petitioner's file on July 8 of 1968. Between that time and his initial interview with Petitioner on September 24, 1968, this Agent determined that payments had been made to Petitioner by American Vending and that same were not reflected on his tax return. Lewis and Internal Revenue Agent, Lawrence Sorth, went to Petitioner's house on September 24 and, after identifying himself as a Special Agent, Lewis stated that his duties included "investigating the possibility of criminal tax fraud."

Lewis then began to interrogate Petitioner, whereupon Sorth, according to Lewis, interrupted and stated "Mr. Lewis, shouldn't you advise him of his constitutional rights, that he didn't have to say anything that can be used against him later or that he is entitled to an attorney present if he desires."

At a hearing on Petitioner's Motion to Suppress the Revenue Agent denied making this detailed statement as

related by Lewis and said he only inquired "what about his rights" to which Lewis replied "yes, if he has done anything wrong". Lewis then interrogated Petitioner and at trial, over objection, testified to certain statements made at this interview.

REASONS FOR GRANTING THE WRIT

1. The Government Failed to Sustain the Burden of Proof Imposed by Reason of the Wording of the Indictment.

As a preliminary matter it would not be amiss to note that Form 1040 has evolved to such a state of complexity that none but the consummate expert would claim competence to construct a return correct in all respects. Indeed, they seldom agree among themselves. As we shall see in this case, the correct place to report these payments in gross is not at all clear, but in any event "total income" on Page 1 is not the place, if, as here, there are legitimate deductions.

Insofar as we can determine, this is the first case before this Court wherein a determination is sought of what the government must allege and prove, absent any implication of tax liability, in order to show a violation of Sec. 7206(1), Title 26 U.S.C. in connection with the filing of a Form 1040 tax return. The specific narrow issue to be determined is whether or not the government can merely show that the taxpayer's return was incorrect and nothing more, or whether having alleged a specific incorrectness it must then conform its proof to the particular allegation it has made.

Rule 7 of the Federal Rules of Criminal Procedure sets forth the guidelines to which an indictment must conform. An indictment "shall be a plain, concise, and definite

written statement of essential facts, constituting the offense charged".

This Court has stated that to conform to Rule 7 an indictment should follow the wording of the statute and clearly inform the defendant of that which he is accused. **U.S. v. Debrow, 346 U.S. 374 (1953).**

The present indictment does follow the wording of the statute in that it alleges that Petitioner filed a return that was not correct "as to every material matter". For the "matter" to be material it must have some bearing upon the determination of tax liability. **U.S. v. Null, 415 F2d 1178 (C.A. 4th 1969).** The government, in order to conform to the rulings in **Debrow** and **Null** alleged here that the incorrect "material matter" was a failure to report the gross receipts from American Vending as part of "total income". This allegation thereby informed Petitioner in clear language that he stood accused of omitting these sums from "total income" which, as can be seen, has a direct bearing on the computation of the tax (App. II).

Once the government chose this specific allegation it was incumbent upon it to prove same. This the government failed to do when it restricted its proof to the receipt of the gross amount from American Vending, and nothing more. It was the government's burden to show that the American Vending receipts must be reported in the amounts specified as part of "total income". Any proof short of this does not conform to the allegation.

It is the position of Petitioner that the gross receipts were offset by allowable expenditures on business promotion and that the receipts would not, under any circumstances, change his reported figure of "total income" on Line 9 of Form 1040. The government's mere showing of receipts falls far short of proof, beyond a reasonable

doubt, that "total income," a figure subject to offsets by expenses and deductions, was necessarily incorrect by the precise gross amount received from American Vending.

In support of Petitioner's position that the government's allegation was that all American Vending receipts were reportable on Line 9, Page 1 under total income, it should be noted that the govenrment had previously indicted Petitioner for incorrect reporting of "taxable income" by the gross amount received from American Vending Company, although it did not make reference to the source, all under Sect. 7206(1) (App. III). The term "taxable income" by definition, 26 U.S.C., § 63, is something less than gross income or receipts. It is the gross reduced by allowable expenses and deductions. The government was stating, under the prior indictment, that all receipts were required to be reported as part of "taxable income" undiminished by deductions and expenses and it could not possibly refer to any page other than page 1 of Form 1040. When the present indictment was filed the government changed from "taxable income" to "total income" but kept its theory that all receipts had to be reported without deductions or expenses at a particular place to wit: page 1 (App. IV). The government, by the wording of the indictment and the figures inserted, served notice upon Petitioner that it intended to prove that the gross receipts from American Vending Company were reportable on Line 9, Page 1. (The difference between the reported "total income" and the alleged correct "total income" was the exact amount Petitioner received, in gross, from American Vending Company.) There was a total failure in proving this specific allegation.

In paraphrasing the indictment in the instant case, the Court of Appeals for the Eighth Circuit, in a footnote, stated that Petitioner was charged with subscribing a return that he did not believe to be true and correct as to

"every material matter **included therein**". (Our emphasis, App. I, page 1.) The Court of Appeals substituted the term "included therein" in lieu of the words of the indictment that the return was incorrect in a material matter in that the **"total income" figure was misstated.** The error in the Eighth Circuit's opinion is that by stating the charge in this manner, rather than in the actual wording of the indictment, the Court made the foot fit the shoe, not vice versa. Such a determination by the Eighth Circuit would support and affirm the verdict only if the indictment had been worded in the way the Court stated. But this was not the case. It ruled out by mere definition Petitioner's defense that the money received was not reflected in "total income" because it was spent on allowable business expenditures and under no circumstances would be reflected in "total income". It permits the government to prove its specific allegation by a mere general showing of a failure to report at any place in the return the receipts in question.

The Internal Revenue Code, the Regulations issued thereunder and the structure of the return makes it readily apparent that gross receipts are not necessarily reflected in "total income" on Line 9, Page 1 of Form 1040.

The business entertainment expenditures made by Petitioner, as testified to by a number of witnesses, were allowable and deductible under 26 U.S.C. § 162. ". . . an employer's expenses in connection with social or other activities incurred to improve employee relations, to build up good will and increase efficiency are generally deductible under Section 162. . . ." PH Fed. Taxes 1971, § 11,182. See also P-H Fed. Taxes 1971, § 11,180.

Business connected expenses are permitted to be used as direct offsets against receipts in computing "total income". "This permits the deduction of allowable business expenses in computing adjusted gross income without

effecting the individual's right to use the standard deduction or to compute his tax from the tax table." P. H. Fed. Taxes, 1971, § 12,067(a).

Since the deductions and expenses are permitted to be offset against the receipts it is necessary to show the receipts, and the proper place of reporting same, in order to establish the incorrectness, if any, in "total income" on Page 1 of the return.

The receipts from American Vending were reportable in two places on the Form 1040 for the years in question.

If Petitioner was acting as an independent contractor in respect to the receipts from American Vending, said receipts would have been reportable on a Schedule C. As can be observed from an examination of this Schedule (App. VI), deductions and expenses are also reportable thereon and only the net figure is brought forward to Page 2 and subsequently Page of the return. P. H. Fed. Taxes 1971, § 7627. Obviously, if there is no net figure to forward from Schedule C there could be no change in the reported figure of "total income."

The other manner in which the American Vending receipts might be reported would be under miscellaneous income on Page 2 of the return. The Internal Revenue Service in its official book of instructions for the years in question states:

> ". . . Miscellaneous Income.
>
> If you cannot find any particular place on your return, or related Schedules, to list certain types of income, report it on Line 7. . . ."

Whether the gross amount and allowable deductions or only the net amount is to be reported at this line is not set forth in the instructions or any applicable regulation.

Therefore, in order to avail himself of the right to use the standard deduction and the tax table, a taxpayer is

permitted to deduct business connected expenses directly from the receipts. It necessarily follows that such receipts and off-setting deductions must be reported at some place on the return other than Page 1 and the net only will be forewarded to be reflected thereon as part of "total income". If the deductions completely offset the receipts there will be no change reflected in "total income" because of these specific receipts.

The "heart of the controversy" was **not** as the Eighth Circuit Court of Appeals found "(1) whether appellant was legally relieved from reporting the cigarette payments because he derived no personal gain therefrom, and (2) whether he wilfully and knowingly filed a return which was false as to a material matter" (App. I, page A-4). The Court of Appeals is again igoring the fact that the indictment was specific as to the "material matter" which was false. It treats the indictment as alleging that Petitioner filed a return that was not true and correct as to every material matter throughout. Under this interpretation a mere showing of receipt of the payments would have been sufficient to sustain such a general allegation but under the actual wording of the indictment the government had to go further and show that the receipts were reportable in such a manner that they would reflect necessarily in the "total income" figure of Line 9, Page 1. Obviously, the government has a far greater burden when held to the wording of its indictment.

The effect of the decision of the Court of Appeals is two-fold.

First, it permits a constructive amendment to the indictment. Since **Ex Parte Bain, 121 U.S. 1 (1887),** the concept of harmless error has not been applied where an indictment has been amended. To avoid dismissal called for in **Bain** prosecutors have made a practice of permitting an indictment to stand and simply varying the proof.

The resulting variance has been held not to call for dismissal except upon a showing of prejudice. This practice has been limited by **Stirone v. U.S., 361 U.S. 212 (1959),** wherein the Court held that a variance that results in a constructive amendment is subject to the rule of **Ex Parte Bain** and should be dismissed.

The instant indictment alleges that Petitioner's return was incorrect for failing to report the gross receipts from American Vending in "total income" which is shown only on Line 9 of Page 1 of Form 1040. The prosecution proved only the receipt of the money and the failure to reflect it on Page 1. There was no proof that the gross receipts necessarily were to be reflected under proper reporting procedures in "total income." As a matter of fact, as we set forth above, the government specifically objected to this becoming an issue. This is a material variance and amounts to a constructive amendment calling for dismissal under **Stirone,** *supra.*

Second, it deprives Petitioner, or any other accused taxpayer, of the right to offer, in connection with form 1040, allowable deductions and expenses as a defense. There can be no argument that certain deductions and expenses can be offset against gross receipts and the net only is forwarded and reported as part of "total income" in the returns for the years in question. To permit Petitioner's conviction to stand, under the wording of the indictment, effectively eliminates his right to the use of business expenditures because it compels a finding that the gross receipts must be reported in "total income" undiminished by such deductions.

The trial court instructed the jury (App. VII) that the evidence of Petitioner's promotion expenditures was not alone a defense to the charge. The instruction permitted only a limited consideration of the expenditures. The jury was not permitted, under this instruction or any

other, to find that the promotional expenditures reduced the receipts to a point whereby "total income," the alleged incorrect material matter, would be as reported, and, therefore, no violation of the statute. Petitioner, charged criminally, is certainly entitled to all allowances afforded by the Internal Revenue Code to a taxpayer. He has been effectively deprived of allowable business connected deductions and therefore due proces of law by this conviction.

2. **The Use of the Term "Kickback" by the Special Agent Was Prejudicial Error Calling for a Reversal and New Trial.**

The issue before the jury was narrow and specific as we set out in Point I herein. Petitioner was certainly entitled to a trial on the charges as alleged in the indictment without passion or prejudice being thrust into the proceedings.

When the Agent branded the payments as a "kickbank" he injected a new, irrelevant and highly prejudicial issue into the trial—the legality of the payments. The Prosecutor nourished this seed of prejudice planted by the Agent when he inferred in his closing argument that Petitioner was engaged in a shake-down of the supplier (App. VIII).

The character of the payments, the legality and the reason therefor were not issues that bore upon Petitioner's guilt or innocence; to term the payments as a kickback created an atmosphere so prejudicial that Petitioner's right to a fair trial was impaired. It is impossible to weigh the effect that such statement had on the outcome of the trial and when one "can not say with fair assurance, after pondering all that happened . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." **Kotteakos v. U.S., 328 U.S. 750 (1945).**

3. Petitioner Was Entitled to Have Certain Statements Made by Him to the Special Agent of the Internal Revenue Service Excluded From Evidence as He Was Not Given Proper Warnings by the Agent Before the Interrogation.

Certain statements made by Petitioner to the Special Agent Lewis on September 24, 1968, were admitted into evidence over objection. At the time of the interview Lewis was fully aware that Petitioner had received payments from American Vending and had not reported same on his return. This was, in essence, all the government showed at trial.

In effect, at the time of the September 1968 interview, was the Internal Revenue Service directive requiring Special Agents to give certain warnings to taxpayers suspected of criminal violations (IRS News Release of Oct. 3, 1967) (App. IX). This procedure was not followed in the interrogation of Petitioner. When a government agency establishes and announces a procedural safeguard and an agent fails to conform to the procedure, there is a denial of due process. **Accardi v. Shaughnessy, 347 U.S. 260 (1954).**

There is a direct conflict between the Circuit Courts of Appeals on the application of **Miranda v. Arizona, 384 U.S. 436**, to non-custodial tax interrogations. The 9th Circuit, in **Spahr v. U.S., 409 Fed 2d 1303**, the 5th Circuit in **U.S. v. Jernigan, 411 Fed 2d 471**, and the 8th Circuit in **Cohen v. U.S., 405 Fed 2d 34**, have refused to extend Miranda to non-custodial interrogations. The 1st Circuit, in **U.S. v. Leahey, 434 F 2d 7**, and the 7th Circuit in **U.S. v. Dickerson, 413 Fed 2d 1111**, have extended the Miranda rule to certain non-custodial situations. **Leahey** has, in addition, required Special Agents to follow the announced procedures of Internal Revenue Service in

conducting criminal tax investigations. This court, in **Mathis v. U. S., 391 U.S. 1,** has extended Miranda to tax investigations but has yet to decide the question as to whether a taxpayer is entitled to the procedural safeguard that Miranda offers to non-custodial interrogations.

The instant case presents the opportunity to decide this important question. The Special Agent had every reason to believe that a criminal violation had occurred at the time of his first contact with Petitioner, and to permit him to interrogate Petitioner and obtain incriminating statements without advising Petitioner of his rights is a constitutional deprivation of the first magnitude.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted

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APPENDIX I

United States Court of Appeals for the Eighth Circuit

No. 71-1594

United States of America, Appellee,

v.

John R. Engle, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: April 14, 1972.
Filed: May 2, 1972.

Before MR. JUSTICE CLARK,* MATTHES, Chief Judge and LAY, Circuit Judge.

MATTHES, Chief Judge.

John R. Engle has appealed from the judgment of conviction finding him guilty under a three-count indictment of violating § 7206(1) Internal Revenue Code.[1]

* Retired Associate Justice of the United States Supreme Court, sitting by designation.

[1] The counts of the indictment, drawn in compliance with § 8206(1), charged that appellant did willfully and knowingly make and subscribe a United States income tax return which was verified by a written declaration by appellant, made under the penalties of perjury, and which he did not believe to be true and correct as to every material matter included therein. Count I alleged appellant's return for 1965 reported total income of $35,106.51, whereas he then and there well knew and believed the correct total for 1965 was $39,006.50; Count II alleged a discrepancy of $4,400.09 in the return for 1966; Count III alleged a discrepancy of $2,019.00 in appellant's return for 1967.

Five contentions of error are presented and relied upon for a reversal. The first claim, which we regard as the central issue, is an indirect, if not a head-on, challenge of the sufficiency of the evidence to warrant submission of the case to the jury. In appellant's language, the point is thus phrased:

> "Defendant was charged with a failure to report certain income, undiminished by deductions, on Line 9, Page 1 of Form 1040 for the three years in question. The Government failed to prove defendant guilty of such a violation and the court failed to properly instruct on the law and evidence as adduced under the indictment."

Before proceeding to the merits of this ingenious argument, a review of the facts, concerning which there is slight disagreement, will serve to place appellant's position in proper perspective.

During the subject years appellant was president of Steak'N Shake, a corporation which operated a chain of approximately 75 drive-in restaurants, about 20 being in the metropolitan St. Louis area. For a number of years prior to 1965, including the taxable years in question, the American Cigarette Vending Company had been authorized to and had placed cigarette vending machines in Steak'N Shake restaurants in the St. Louis area. Under an arrangement between appellant and one of the partners of the vending company, the latter agreed to and did pay appellant one and one-half cents on every package of cigarettes sold by the vending company in the St. Louis area restaurants. The evidence conclusively showed that for 1965, 1966, and 1967, the unreported income derived from this source was $3,897.48, $4,400.09, and $2,119.00, respectively.

It is obvious from the evidence that it was intended from the outset to carry out the plan in a clandestine

manner to prevent other officers of the two involved corporations, American Vending and Steak'N Shake, from gaining knowledge of the transaction. Knowledge of the payments made to appellant apparently was limited to one Jack O'Shea, an original partner in the vending company, a Mrs. Cronin, who succeeded O'Shea upon his death, and appellant.

According to the undisputed evidence, Mrs. Cronin, who ascertained the amount due appellant on each month's sale of cigarettes, would draw a check on the vending company account payable to that company, would place the check in the cash register, withdraw currency equivalent to the amount of the check, place the currency in an envelope and deliver it to appellant, who regularly called at the office of the vending company for the purpose of taking possession of the amount of his "take." Appellant's income tax returns were prepared by Mr. Roark, secretary-treasurer of Steak'N Shake, on the basis of information forwarded him by appellant. Concededly, the amount paid to appellant on the basis of one and one-half cents for each package of cigarettes was not disclosed to Roark because, in appellant's words, "I didn't think it was any of his business."[2]

It should also be stated that the failure of appellant to report the amounts received from the vending company on his 1965, 1966, and 1967 returns was not an issue in the trial. That fact was conceded. The thrust of the defense was that the sum of the payments received over the years did not constitute income in the sense that it was taxable.

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[2] The American Cigarette Vending Company also paid to Steak'N Shake "about" three cents on each package of cigarettes sold in the vending machines located in the Steak'N Shake restaurants. However, no effort was made to conceal this arrangement. A check was drawn monthly by the vending company and mailed to Steak'N Shake at its home office and a complete record was made of the payments by both companies.

Appellant vociferously advocated throughout the trial that the total of the payments received by him was spent for entertainment of employees of Steak'N Shake and other persons, for the avowed purpose of promoting the business and good will of the Steak'N Shake Company. He regarded his take as "stash money . . . It was like liquor to me, I stuck it in my pocket and spent it." Thus, stripped of all non-essentials, the heart of the controversy turned on the questions (1) whether appellant was legally relieved from reporting the cigarette payments because he derived no personal gain therefrom, and (2) whether he willfully and knowingly filed a return which was false as to a material matter.

The foregoing recitation of the facts should suffice to completely dissipate any doubt as to the sufficiency of the evidence to sustain the conviction. Contrary to appellant's submission of error above delineated, the indictment was not couched in language charging appellant with failure to report certain income "on Line 9, page 1 of Form 1040," and succesful prosecution was not confined to such a narrow and unrealistic theory. As pointed out above in the margin, appellant was charged with filing a return believing it not to be true and correct, and that charge was sufficiently proven.

The unique contention here espoused by appellant is closely akin to that advanced by the defendant in *Siravo v. United States*, 377 F.2d 469 (1st Cir. 1967). In ruling the question the court observed:

> "In our view it is unnecessary to resolve this dispute in semantics, for we hold that a return that omits material items necessary to the computation of income is not 'true and correct' within the meaning of section 7206. If an affirmative false statement be required, it is supplied by the taxpayer's declaration that the return is true and correct, when he knows it is not. Therefore, the government has made out a

> violation of the section, whether it be labelled 'a perjury statute,' or 'similar in nature'."

377 F.2d at 472 (citations omitted).

We dealt with § 7206(1) in *United States v. Lodwick*, 410 F.2d 1202 (8th Cir.), *cert. denied*, 396 U.S. 841 (1969). In discussing the statute, Judge Van Oosterhout quoted at some length from *Gaunt v. United States*, 184 F.2d 284 (1950), *cert. denied*, 340 U.S. 917, 71 S.Ct. 350, 95 L.Ed. 662 (1951), where the First Circuit stated:

> "It seems to us clear that the latter subsection [Section 145(c), the forerunner of Section 7206(1) makes it a felony merely to make and subscribe a tax return without believing it to be true and correct as to every material matter, whether or not the purpose in so doing was to evade or defeat the payment of taxes. That is to say, it seems to us that the subsection's purpose is to impose the penalties for perjury upon those who wilfully falsify their returns regardless of the tax consequences of the falsehood."

184 F.2d at 288, quoted in 410 F.2d at 1205-06.

To summarize, we hold that the evidence sustained the charge as laid in all three counts. The statute mandates that appellant should have reported the amounts he received on his returns. If in fact he expended this income for legitimate deductible purposes, he could have claimed such deductions. He chose not to pursue that course, but rather to completely ignore the income in making his returns.

Appellant next complains because the court denied his motion for a mistrial when a witness for the Government, in response to a question on direct examination, referred to the payments received by appellant as "kickbacks." The court, upon motion, ordered the question and answer stricken and admonished the jury to disregard both. However, appellant's motion for a mistrial was denied. We

are satisfied the incident did not require a mistrial. Indeed, we suspect the agent's use of the term "kickbacks" was warranted. In any event, no prejudice resulted.

Neither did the court err in refusing to admit into evidence a handwritten exhibit, apparently prepared by appellant. The exhibit appears to be a summary of amounts expended by appellant for entertainment, such as bowling, baseball and football games, and refreshments. The summary was admittedly only an estimate of the expenditures; it was not relevant to the basic issue, *i.e.*, whether appellant had willfully filed a false statement within the meaning of the statute and, finally, the information contained on the exhibit was cumulative. Appellant and other wit nesses for him testified to appellant's proclivity for being a free spender.

Appellant's attack upon the court's instructions is also lacking in substance. The essential elements of the offense were carefully delineated. A verdict of guilty was authorized only upon a finding beyond a reasonable doubt that appellant had not only failed to report the payments, but that such failures were made willfully, deliberately, and knowingly, as distinguished from carelessly, inadvertantly, or negligently. The instructions, considered as a whole as they must be, constituted an appropriate submission.

Finally we are confronted with the contention that the court erred in denying appellant's motion to suppress certain statements made by him to the Internal Revenue Agents during the course of their investigation. This contention rests on the claimed failure of the agents to inform appellant fully of his constitutional rights to remain silent.

In this connection, the record reveals that on or about September 24, 1968, Internal Revenue Agent Sorth, accompanied by Special Agent Lewis, interviewed appellant at his home. After entering appellant's home at appel-

lant's invitation, Lewis, who was introduced as a Special Agent, informed appellant that his function was to investigate the possibility of criminal tax fraud. Some time during the course of the interview appellant served the agents coffee and they exchanged pleasantries. During the course of the questioning, appellant was advised of certain rights, but it is conceded that full *Miranda* warnings were not given. Appellant did not testify at the hearing on the motion to suppress.

After a plenary hearing, in which appellant's skilled counsel fully developed what occurred, Judge Meredith denied the motion to suppress. In his memorandum opinion, he observed that the motion turned on the credibility of the witnesses. Judge Meredith's opinion reflects that he examined the written reports made by the agents based on the interviews of appellant on September 24 and two subsequent dates. He made a finding that the written interview contained an accurate report of what transpired and that the warnings given were adequate.

On October 3, 1967, the Internal Revenue Service issued News Release No. 897 relating to procedures for protecting the constitutional rights of persons suspected of criminal tax fraud. Under the announced procedures, "On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: 'As a Special Agent I have the function of investigating the possibility of criminal tax fraud'." Additional and comprehensive warnings are not mandated unless further investigation becomes necessary. The facts before us bring this case squarely within the quoted portion of the procedures. It stands uncontradicted that Special Agent Lewis imparted this information to appellant. "I showed Mr. Engle my identification, and when we were seated in the breakfast nook, I stated that as a Special Agent I had the function of investigating the possibility of criminal tax fraud."

The courts have with consistency declined to extend the *Miranda* rule "beyond its stated limits." *Spahr v. United States,* 409 F.2d 1303, 1305 (9th Cir.), *cert. denied,* 396 U.S. 840 (1969). *See also, Simon v. United States,* 421 F. 2d 667, 668 (9th Cir.), *cert. denied,* 398 U.S. 904 (1970); *United States v. Jernigan,* 411 F.2d 471, 472 (5th Cir.), *cert. denied,* 396 U.S. 927 (1969); *Ping v. United States,* 407 F.2d 157, 159 (8th Cir.), *cert. denied,* 395 U.S. 926 (1969); *Cohen v. United States,* 405 F.2d 34 (8th Cir.), *cert. denied,* 394 U.S. 943 (1968). *Cf. United States v. Leahey,* 434 F.2d 7 (1st Cir. 1970). In all of these cases the courts were presented with the identical question now before us, *i.e.,* whether as a prerequisite to use of information obtained in a non-custodial interview with a taxpayer the full *Miranda* warnings are essential. In all but *Leahey,* the court held against the defendant. *Leahey* is clearly distinguishable because, unlike our situation, the Special Agent failed to follow the procedures promulgated by the Service above set out.

Here, if ever, we have a non-custodial interrogation. As we have seen, the interview took place in the home of appellant. Nothing was said or done by either the Special Agent or the other agent to indicate that appellant was being detained or deprived in any significant way of his liberty. He fully understood the mission of the agents and cooperated with them voluntarily. Moreover, no information was obtained which proved prejudicial. The information imparted by appellant in the interview squared precisely with his own testimony during the trial. In summary, we hold that the district court was on sound ground in denying appellant's motion to suppress.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

©©©

Form **1040** **U.S. Individual Income Tax Return** **1966**

For the year January 1–December 31, 1966, or other taxable year beginning ——— 1966, ending ——— 19—— U.S. Treasury Department—Internal Revenue Service

Please print or type

First name and initial (If joint return, use first names and middle initials of both) | Last name | Your social security number (Husband's, if joint return)

Home address (Number and street or rural route) | Your occupation

City, town or post office, and State | ZIP code | Wife's number, if joint return

Enter the name and address used on your return for 1965 (if the same as above, write "Same"). If none filed, give reason. If changing from separate to joint or joint to separate returns, enter 1965 names and addresses. | Wife's occupation

Your present employer and address

Wife's present employer and address, if joint return

Attach Copy B of Form W-2 here

Filing Status—check only one:

1a ☐ Single

1b ☐ Married filing joint return (even if only one had income)

1c ☐ Married filing separately. If your husband or wife is also filing a return give his or her first name and social security number.

1d ☐ Unmarried Head of Household

1e ☐ Surviving widow(er) with dependent child

Exemptions

	Regular	65 or over	Blind	
2a Yourself	☐	☐	☐	Enter number of exemptions checked ▶▶▶
2b Wife	☐	☐	☐	

3a First names of your dependent children who lived with you ——— Enter number ▶▶▶

3b Number of other dependents (from page 2, Part I, line 3)

4 Total exemptions claimed ▶▶▶

Income (If joint return, include all income of both husband and wife)

5	Wages, salaries, tips, etc. If not shown on attached Forms W-2 attach explanation ▶	
6	Other income (from page 2, Part II, line 8) ▶	
7	Total (add lines 5 and 6)	
8	Adjustments (from page 2, Part III, line 5) ▶	
9	Total income (subtract line 8 from line 7) ▶	

Tax Computation (Figure tax by using either 10 or 11)

10	Tax Table—If you do not itemize deductions and line 9 is less than $5,000, find your tax from tables in instructions. Do not use lines 11a, b, c, or d. Enter tax on line 12.	
11	Tax Rate Schedule—	
11a	If you itemize deductions, enter total from page 2, Part IV. If you do not itemize deductions, and line 9 is $5,000 or more enter the larger of: (1) 10 percent of line 9 or; (2) $200 ($100 if married and filing separate return) plus $100 for each exemption claimed on line 4, above. Deduction under (1) or (2) limited to $1,000 ($500 if married and filing separately). ▶	
11b	Subtract line 11a from line 9	
11c	Multiply total number of exemptions on line 4, above, by $600	
11d	Subtract line 11c from line 11b. Enter balance on this line. (Figure your tax on this amount by using tax rate schedule on page 11 of instructions.) Enter tax on line 12.	

Attach Check or Money Order here

Tax Credits Payments

12	Tax (from either Tax Table, see line 10, or Tax Rate Schedule, see line 11) ▶	
13	Total credits (from page 2, Part V, line 5) ▶	
14a	Income tax (subtract line 13 from line 12)	
14b	Tax from recomputing prior year investment credit (attach statement)	
15	Self-employment tax (Schedule C-3 or F-1) ▶	
16	Total tax (add lines 14a, 14b, and 15) ▶	
17	Total Federal income tax withheld (attach Forms W-2) ▶	
18	1966 Estimated tax payments (include 1965 overpayment allowed as a credit) ▶	
19	Excess F.I.C.A. Tax Withheld (two or more employers—see page 5 of inst.) ▶	
20	Nonhighway Federal gasoline tax—Form 4136, Reg. Inv.—Form 2439	
21	Total (add lines 17, 18, 19, and 20)	

Tax Due or Refund

22	If payments (line 21) are less than tax (line 16), enter Balance Due. Pay in full with this return ▶	
23	If payments (line 21) are larger than tax (line 16), enter Overpayment ▶▶▶	
24	Amount of line 23 you wish credited to 1967 Estimated Tax	
25	Subtract line 24 from 23. Apply to: ☐ U.S. Savings Bonds, with excess refunded or ☐ Refund only	

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

Sign here ▶ If joint return, BOTH HUSBAND AND WIFE MUST SIGN even if only one had income. Date ———

Sign here Signature of preparer other than taxpayer. Address Date ———

o00—16—79501-5

APPENDIX III

Prior Indictment

United States District Court
Eastern District of Missouri

United States of America, Plaintiff, v. John R. Engle, Defendant.	No. 71CR95 (1)

The Grand Jury charges:

That on or about the 25th day of February, 1965, in the Eastern District of Missouri, John R. Engle, a resident of Glendale, Missouri, did wilfully and knowingly make and subscribe a United States joint income tax return for the year 1964, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director at St. Louis, Missouri, which said income tax return he did not believe to be true and correct as to every material matter in that the said income tax return reported taxable income in the amount of $27,681.84 for the year 1964, whereas, as he then and there well knew and believed, the correct taxable income for the year 1964 was $31,569.50.

In violation of Section 7206(1), Internal Revenue Code; Section 7206(1), Title 26, United States Code.

—Count II—

The Grand Jury further charges:

That on or about the 22nd day of March, 1966, in the Eastern District of Missouri, John R. Engle, a resident

of Glendale, Missouri, did wilfully and knowingly make and subscribe a United States joint income tax return for the year 1965, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director at St. Louis, Missouri, which said income tax return he did not believe to be true and correct as to every material matter in that the said income tax return reported taxable income in the amount of $28,969.32 for the year 1965, whereas, as he then and there well knew and believed, the correct taxable income for the year 1965 was $32,744.62.

In violation of Section 7206(1), Internal Revenue Code; Section 7206(1), Title 26, United States Code.

—Count III—

The Grand Jury further charges:

That on or about the 22nd day of March, 1967, in the Eastern District of Missouri, John R. Engle, a resident of Glendale, Missouri, did wilfully and knowingly make and subscribe a United States joint income tax return for the year 1966, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director at St. Louis, Missouri, which said income tax return he did not believe to be true and correct as to every material matter in that the said income tax return reported taxable income in the amount of $30,713.65 for the year 1966, whereas, as he then and there well knew and believed, the correct taxable income for the year 1966 was $35,113.74.

In violation of Section 7206(1), Internal Revenue Code; Section 7206(1), Title 26, United States Code.

—Count IV—

The Grand Jury further charges:

That on or about the 18th day of March, 1968, in the Eastern District of Missouri, John R. Engle, a resident of Glendale, Missouri, did wilfully and knowingly make and subscribe a United States joint income tax return for the year 1967, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director at St. Louis, Missouri, which said income tax return he did not believe to be true and correct as to every material matter in that the said income tax return reported taxable income in the amount of $31,442.66 for the year 1967, whereas, as he then and there well knew and believed, the correct taxable income for the year 1967 was $33,561.66.

In violation of Section 7206(1), Internal Revenue Code; Section 7206(1), Title 26, United States Code.

A True Bill

.....
Foreman

.....
United States Attorney

APPENDIX IV

Present Indictment

United States District Court
Eastern District of Missouri

United States of America, Plaintiff, v. John R. Engle, Defendant.	No. 71 CR 213(1).

The Grand Jury charges:

That on or about the 22nd day of March, 1966, in the Eastern District of Missouri, John R. Engle, a resident of Glendale, Missouri, did willfully and knowingly make and subscribe a United States joint income tax return for the year 1965, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director at St. Louis, Missouri, which said income tax return he did not believe to be true and correct as to every material matter in that the said income tax return reported total income in the amount of $35,106.51 for the year 1965, whereas, as he then and there well knew and believed, the correct total income for the year 1965 was $39,006.50.

In violation of Section 7206(1), Internal Revenue Code; Section 7206(1), Title 26, United States Code.

Second Count

The Grand Jury further charges:

That on or about the 22nd day of March, 1967, in the Eastern District of Missouri, John R. Engle, a resident of Glendale, Missouri, did willfully and knowingly make

and subscribe a United States joint income tax return for the year 1966, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director at St. Louis, Missouri, which said income tax return he did not believe to be true and correct as to every material matter in that the said income tax return reported total income in the amount of $37,411.41 for the year 1966, whereas, as he then and there well knew and believed, the correct total income for the year 1966 was $41,811.50.

In violation of Section 7206(1), Internal Revenue Code; Section 7206(1), Title 26, United States Code.

Third Count

The Grand Jury further charges:

That on or about the 18th day of March, 1968, in the Eastern District of Missouri, John R. Engle, a resident of Glendale, Missouri, did willfully and knowingly make and subscribe a United States joint income tax return for the year 1967, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director at St. Louis, Missouri, which said income tax return he did not believe to be true and correct as to every material matter in that the said income tax return reported total income in the amount of $38,836.44 for the year 1967, whereas, as he then and there well knew and believed, the correct total income for the year 1967 was $40,955.44.

In violation of Section 7206(1), Internal Revenue Code; Section 7206(1), Title 26, United States Code.

A True Bill

.....

Foreman

.....

United States Attorney

APPENDIX V

Testimony of Special Agent of Internal Revenue Service, Gill Lewis

[203] **Direct Examination**, by Mr. Koster

Q. Mr. Lewis, for the purpose of the record you are the same Gilbert Lewis who was testifying on behalf of the Government in this case?

A. Yes, sir. When I gave my name before I said it was Gill, G-i-l-l.

Q. My mistake. G-i-double l?

A. Yes, G-i-double l.

Q. Mr. Lewis, I am going to hand you what is marked Government's Exhibits 1, 2 and 3. Those are the three tax returns of John Engle for '67, '66 and '65, right?

A. Yes, sir.

Q. Mr. Lewis, you have testified you have been connected with the Internal Revenue Service for twenty-six years, is that correct?

[204] A. Correct.

Q. You have worked with tax returns? You have been in the law enforcement field or enforcement of Internal Revenue laws for that period of time?

A. Yes.

Q. Mr. Lewis, on the tax returns we are talking about for all three years is an identical return, is it not? I mean the form of the return is identical?

A. Will you make that a little more specific? There may be some wording or something in a different place on the return. I don't know what you want.

Q. Basically, the 1040 return form is the same for each of the three years?

A. Yes. But every year there are a few changes, you know.

Q. Would you just look at these? Basically, those are the same, are they not?

A. They have the same form number.

The Court: Why don't you be more specific, Mr. Koster?

Q. (By Mr. Koster) Are they the same?

A. They are form 1040's but the material that is in here as to what questions and the positions, I don't know.

Mr. Koster: I will be specific as to each one.

The Witness: I wish you would.

[205] Q. (By Mr. Koster) Mr. Engle is charged with reporting incorrectly his total income, is that correct?

A. Right.

Q. What line do you place total income in on form 1040 for the three years we are talking about?

A. On the form for '65 that I have, the form 1040 for the year '65, you go down on the face of the form to line 9 and it says total income. There is a line there where he reports a sum.

Q. So then on line 9 it is for all three years, is it not?

A. I will have to see. (Witness looks at exhibits.) Yes, sir.

Q. All right. What line do you report wages and salaries in these three years?

A. Line 5.

Q. Does—This is the income that your employer pays you, that is the W-2 income, is it not?

A. Well, they say wages, salaries, tips, et cetera.

Q. W-2 attached, isn't that correct?

A. Yes.

Mr. Newton: Your Honor, I would object to that as an incorrect statement. It can come from several sources.

Q. (By Mr. Koster) Now, Mr. Lewis, what do you report on [206] line 6 of the return?

A. It says on the return for '65 on line 6, other income from page 2, Part 11, line 9.

Q. From page 2, Part 11, line 9, is that right?

A. Yes.

Q. Now, this money that Mr. Engle received, where would that be reported on page 2?

A. On page 2, it says, Part 2, income from all other sources other than wages, salaries, et cetera.

Mr. Newton: May I interpose an objection, Your Honor? I don't understand the purpose of this unless Mr. Koster is trying to say this income should not be reported any place. I don't understand the purpose of the line of questioning.

The Court: I wouldn't know but we will get into it; I assume he will illuminate the thing for the Court and jury.

Proceed.

Mr. Koster: Thank you.

Q. (By Mr. Koster) The additional money that Mr. Engle received should be reported where again, sir?

A. On page 2, and then they have part 2, income from all other sources other than wages, salaries and so forth.

Q. All right. What line is that?

A. On the '65 return it is part 2, drops down about four or five spaces, then part 2, then they have dividends and [207] other distributions as the first part of it. Gross amount, non-taxable, subtract line b from a, give details, I am just reading from the return, sir.

Q. What line on page 2 would this income be shown on, sir?

A. Well, down at line 8 at the bottom it says other sources, state nature.

Q. All right.

A. We have that. Now, that is on '65. Let's see, you are asking about all three. Let's see if there are any changes. In '66, they had down there miscellaneous income, state nature. On '67, miscellaneous income, state nature and source. That is the three years.

Q. So the income should be under the miscellaneous or other sources, is that correct, for each of the three years, which is line—It is a different numbered line, but it should be under that miscellaneous, other sources, is that correct?

Mr. Newton: If the Court please, I am not sure this man is qualified. He is a special agent, not an ordinary revenue agent. I am not sure he is qualified to go into the mechanics of making up an income tax return.

Mr. Koster: I think twenty-six years in the Service——

Mr. Newton: As a special agent, not an ordinary agent.

[208] The Court: Overruled. Let's go.

Q. (By Mr. Koster) Now, Mr. Lewis, if there are offsets or expenses incurred in connection with this additional income, where would they be shown?

A. There would have to be a reference to the Internal Revenue Code. And in my duties I am not nearly as experienced as the revenue agent who is examining returns in his duties. I never examined a return. I go to the revenue agent and if we have anything that I don't understand, he gives it to me.

Q. Mr. Lewis, could you take—let's say the '65 return, the first year. On line 8 on page 2 where it says other

sources, state nature, you say that the income could be put there, is that correct?

A. I would say you could put other income in that spot.

Q. Then you could take away any expenses you had from that on that line also, could you? You could put the net figure in there, could you not?

A. I am not sure of that. At one time it had to go on the face.

Q. There is no place on the face of the return. The face of the return just says line 6 other income, does it not?

A. Yes.

Q. So you have got to take it off, you have to remove the offset, you have to subtract any deductions, any offset [209] or expenses that you may have before you go to the front of the return, do you not?

A. Mr. Koster, at one time, and I am not sure whether it is in these years and I don't want to give you that answer, you put it on first, you showed it, then if you could take it off, you took it off. Whether it is in these years or not, I am not sure.

Q. If you took it off and it came out to zero, if the net result was zero, then on the front of the return for other income what do you have? You would have zero, would you not?

A. If that was following the Code at that time.

Q. If you had zero on the front of the return then line 9 would be exactly the same, would it not?

Mr. Newton: Your Honor, I would object to the question; that is not accurate; what Mr. Koster has said is not accurate. What Mr. Koster is talking about can only be done when you have done it in the proper way and you X on your return that you are doing it that way. I object to this as an improper statement of the facts.

The Court: Proceed.

Q. (By Mr. Koster) If you had offset your expenses that total the income what you would put on line 6 of the face of the return is zero, would it not be?

Mr. Newton: I object to that as an improper statement.

[210] Mr. Koster: We have gone over the back of the return.

Mr. Newton: I will say your question is based on an improper premise.

The Court: Let me have a copy of the return.

(Thereupon, there was a conference at the bench out of the hearing of the jury and off the record.

Thereafter the trial on the issues was resumed in the presence and hearing of the jury.)

Q. (By Mr. Koster) Mr. Lewis, if the income is equally or more than equally offset by expenses or by, well, by expenses, if the expenses equal the income or if they more than equal the income, line 6 on page 1 would be zero, isn't that correct?

A. If that is according to the Code for that year.

Q. All right. Now line 6,——

Mr. Newton: Wait a minute. He says he doesn't know the answer.

Q. (By Mr. Koster) Are you telling me you don't know the answer to that question?

A. That is right. Because the Code changes. If I give you a statement that isn't according to the Code, it would be erroneous. I don't know at this point what the Code says.

Q. Go to page 2.

The Court: Mr. Koster, in due time the Court is going [211] to instruct the jury about the law. Now this man, while he is a special agent, is not qualified to give you

what the law is. This depends on the interpretation of the entire Revenue Code. Continue.

Q. (By Mr. Koster) Mr. Lewis, not to belabor the point, your testimony is you don't know the proper way to set out, to fill out this form according to the income that we are talking about here at the time we are talking about here?

A. According to the Code for '65, I wouldn't want to say without referring to it, because I have never examined a return in my twenty-six years.

Q. The same is true for '66 and '67, you are not familiar enough with the Code to be able to tell us, is that correct?

A. That is correct.

Mr. Koster: Thank you.

The Court: Do you have any further questions on direct, Mr. Koster?

Mr. Koster: Let me just check a moment, Judge.

Q. (By Mr. Koster) Did Mrs. Cronin—Cross that.

Mr. Koster: I believe that is all I have, Your Honor.

SCHEDULE C (Form 1040)
U.S. Treasury Department
Internal Revenue Service

Profit (or Loss) From Business or Profession

(Sole Proprietorships)

(Compute social security self-employment tax on Schedule C–3 (Form 1040))

1966

Attach this schedule to your income tax return, Form 1040 — Partnerships, joint ventures, etc., must file on Form 1065

Name and address as shown on page 1, Form 1040

A Principal business activity (See separate instructions) .....; product .....
(For example: retail—hardware; wholesale—tobacco; services—legal; manufacturing—furniture; etc.)

B Business name ..... C Employer Identification Number .....

D Business location .....
(Number and street or rural route) (City or post office and State) (ZIP code)

E Indicate method of accounting: (1) ☐ cash; (2) ☐ accrual; (3) ☐ other.

1	Gross receipts or gross sales $..... Less: Returns and allowances $.....		$.....
2	Inventory at beginning of year (if different than last year's closing inventory attach explanation)		
3	Merchandise purchased $....., less cost of any items withdrawn from business for personal use $.....		
4	Cost of labor (do not include salary paid to yourself)		
5	Material and supplies		
6	Other costs (explain in Schedule C–1)		
7	Total of lines 2 through 6		
8	Inventory at end of this year		
9	Cost of goods sold (line 7 less line 8)		
10	Gross profit (subtract line 9 from line 1)		
	OTHER BUSINESS DEDUCTIONS		
11	Depreciation (explain in Schedule C–2)		
12	Taxes on business and business property (explain in Schedule C–1)		
13	Rent on business property		
14	Repairs (explain in Schedule C–1)		
15	Salaries and wages not included on line 4 (exclude any paid to yourself)		
16	Insurance		
17	Legal and professional fees		
18	Commissions		
19	Amortization (attach statement)		
20	Retirement plans, etc. (other than your share—see separate instructions)		
21	Interest on business indebtedness		
22	Bad debts arising from sales or services		
23	Losses of business property (attach statement)		
24	Depletion of mines, oil and gas wells, timber, etc. (attach schedule)		
25	Other business expenses (explain in Schedule C–1)		
26	Total of lines 11 through 25		
27	Net profit (or loss) (subtract line 26 from line 10). Enter here; in Schedule C–3, line 1; and on page 2, Part II, line 4, Form 1040		

SCHEDULE C–1. EXPLANATION OF LINES 6, 12, 14, AND 25

C

Line No.	Explanation	Amount	Line No.	Explanation	Amount
		$			$

APPENDIX VII

Trial Court's Instruction

[486] You are further instructed that the Court has permitted in evidence a showing by the defendant that he spent sums of money in cash during the years in question for the entertainment of employees, suppliers, and business associates in conjunction with meetings and athletic events. You are [487] instructed that even though the evidence may show that defendant spent more money for these purposes than he received from the American Cigarette Vending Company and from Steak 'N Shake, this alone is not a defense to this charge. This evidence was admitted for the purpose of determining whether or not the money received from the American Cigarette Vending Company in the years in question was income and whether or not the defendant believed that the money received from American Cigarette Vending Company should have been reported on his tax returns as income during the years in question.

APPENDIX VIII

Portion of Assistant U.S. Attorney's Closing Argument

[468] Now if this money was paid on his demand by Mrs. Cronin that she had to do it, and I maintain that is exactly what it is, and it is just that, just as simple as that, what he did with it thereafter makes no difference to you, no difference at all, in your consideration of this case. If he spent it, regardless of how he spent it, then ladies and gentlemen——

• • • • • • • •

[470] When she became the boss in charge of the company, he goes to her and demands the payments, and they were continued. That is the facts. Just ask yourself, if you were in her shoes and this man came to you and demanded a cent and a half a pack, what would you do? You would do what she did. You would pay it. And that is what she did.

• • • • • • • •

[471] They talk about promoting the company with some of these expenditures. Her little business is mighty small in connection as a supplier for Steak 'N Shake in comparison to some of the other suppliers they may have. Think of the beef they must buy. Think of the ice cream and the milk. Go down the list. Why didn't he go to some of them? They are much more interested in the expansion of Steak 'N Shake, have much more to gain. I will tell you why. Because he couldn't get it. He couldn't get it, but he could go to this little person and shake it out of her, take it in cash, put it in his pocket.

• • • • • • • •

APPENDIX IX

[¶ 6832] IRS News Release No. 897, October 3, 1967.

[1954 Code Sec. 7206]

Criminal tax fraud: IRS procedures: Protection of Constitutional rights.—The IRS described the procedures for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations. The recently adopted procedures insure uniformity in protecting the Constitutional rights of all persons. Back references: ¶ 5714.07 and 5714.16.

In response to a number of inquiries the Internal Revenue Service today described its procedures for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations.

Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.

Instructions issued to IRS Special Agents go beyond most legal requirements to assure that persons are advised of their Constitutional rights.

On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: "As a special agent, I have the function of investigating the possibility of criminal tax fraud."

If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.

If it becomes necessary to take a person into custody, Special Agents must give a comprehensive statement of rights before any interrogation. This statement warns a person in custody that he may remain silent and that anything he says may be used against him. He is also told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U. S. Commissioner.

IRS said although many Special Agents had in the past advised persons, not in custody, of their privilege to remain silent and retain counsel, the recently adopted procedures insure uniformity in protecting the Constitutional rights of all persons.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-18

JOHN R. ENGLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 458 F.2d 1017.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1972 (Pet. App. 1). On May 24, 1972, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including July

1, 1972, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a fatal variance between the proof and the offense charged in the indictment.

2. Whether the use of the term "kickback" by a government witness resulted in the denial of a fair trial.

3. Whether evidence concerning oral statements given by petitioner to a special agent of the Internal Revenue Service in a non-coercive and non-custodial interview should have been suppressed because the agent did not give full *Miranda* warnings concerning petitioner's constitutional rights.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

(1) *Declarations under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

* * * * *

shall be guilty of a felony * * *.

STATEMENT

A three-count indictment (Pet. App. 13-14) charged that petitioner had willfully and knowingly filed joint federal income tax returns for the years 1965, 1966 and 1967 which he did not believe to be true, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.), in that the return reported as "total income" an amount less than his actual total income. A jury convicted petitioner on all counts (Pet. App. 1), and the court of appeals affirmed (Pet. App. 1-8).

The evidence was in substance as follows: Petitioner, during the years involved, was president of a corporation (Steak N' Shake) which operated about 75 drive-in restaurants, about 20 of which were in the St. Louis, Missouri area. In the latter restaurants, the corporation permitted American Cigarette Vending Company ("American Vending") to maintain cigarette vending machines in return for monthly payments, duly recorded on the books of both companies, at the rate of about three cents for each package of cigarettes sold. During these years petitioner personally received payments from American Vending each month in the form of cash in an envelope. These payments, during the years here involved, were at the rate of one and one-half cents for each package of cigarettes sold, and amounted to $3,897.48 in 1965, $4,400.09 in 1966, and $2,119 in 1967—amounts which were precisely the same as the amounts alleged in the indictment as understate-

ments of income (Pet. App. 2-3, 13-14; R. 144-145).[1] Petitioner conceded that none of the payments thus received were reported on his income tax returns. (R. 212-213; Pet. App. 3.) The returns were prepared by Mr. Roark, who was treasurer of Steak 'N Shake, but petitioner did not inform Mr. Roark of the payments because "I didn't think it was any of his business" (R. 189).

Petitioner testified that, although he kept no records (R. 148), he spent all the payments in buying dinners and drinks and otherwise entertaining the employees of Steak N' Shake and that he was not reimbursed for these expenditures (R. 137-188). He had an expense account and received monthly reimbursements from the corporation of about $14,000 per year (R. 194-200). These reimbursed expenses included dinners and drinks for the corporation's employees (R. 210-212). Petitioner testified, however, that he obtained reimbursement only when he entered an expenditure in his expense book (R. 174).

Petitioner testified that this use of cash received from American Vending began in the early 1950's, when the previous president of the corporation (Gus Belt) told him that he (petitioner) was spending more than he was being reimbursed and should have "part of the sales from the cigarettes" (R. 144). Mr. O'Shea, of American Vending, agreed to make the payments (R. 144). The alleged purpose of this arrangement was to prevent a certain Mr. Smith, now deceased, from knowing the full extent of the enter-

[1] "R." refers to the appendix filed in the court of appeals.

tainment expenses, although they were, in petitioner's opinion, for the good of the company (R. 137-142). Mr. Belt was the founder of the company and, together with his family, was the majority stockholder; Mr. Smith was a minority stockholder (R. 192). Roark, the treasurer, never questioned any of petitioner's expense accounts and always paid the amounts involved (R. 218-219).

Steak 'N Shake had gross sales of $22,000,000 in 1970, including $9,000,000 in the St. Louis area (R. 193-194). Before Mr. O'Shea died in 1958, petitioned picked up the cash payments at a tavern (R. 73, 148-149). Later, after Mrs. Cronin became president of American Vending, petitioner went to her place of business and told her that he wanted "a cent and a half a pack on the commission on the cigarettes" (R. 56-58). She acquiesced (R. 58).

ARGUMENT

1. Petitioner's contention (Pet. 7-14) that there was a fatal variance between the indictment and the proof is based on petitioner's unwarranted assumption that the references in the indictment to an understatement of "total income" (Pet. App. 13-14), are to page one, line 9, of each return, where total income, for computation purposes, has a more restricted meaning than in its ordinary sense. At page one, line 9, "total income" is a figure comprised of, *inter alia*, wages, salary, and "other income" (R. 324, 327, 330; Pet. App. 9). The "other income" can be a net figure brought forward from elsewhere in the return, thus

excluding income required to be listed elsewhere on the form. Thus, a taxpayer might have business income or miscellaneous income, required to be reported elsewhere, which might be completely offset by allowable business expenses, leaving nothing to be brought forward to page one and thus not being shown on page one, line 9.

The flaw in petitioner's contention, as the court of appeals observed (Pet. App. 4), is that the indictment makes no reference to page one, line 9. The ordinary meaning of "total income" is the same as total receipts or gross income, which includes income against which other deductions are claimed. The fact that "total income" may have a different meaning on page one of the return does not demonstrate that petitioner was misled as to what this quite simple indictment charged, *i.e.*, that we had knowingly failed to report some of his income. Cf. *Berger* v. *United States*, 295 U.S. 78, 82.

If petitioner had any doubt as to what items comprised the alleged understatement of total income, he could have had the matter clarified by requesting a bill of particulars. In fact, petitioner knew exactly what the government's proof would be, since he had discussed with Special Agent Lewis the fact that he had received the cash payments in question but had not reported them in his income tax returns (R. 110-111).

Furthermore, petitioner never challenged the sufficiency of the indictment until after the trial. "An indictment will be construed liberally in favor of its

sufficiency where objection to it is first made after verdict or judgment." *United States* v. *Norman*, 391 F.2d 212, 213 (C.A. 6), certiorari denied, 390 U.S. 1014. "Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment." *Hagner* v. *United States*, 285 U.S. 427, 433.

Petitioner contends (Pet. 13-14) that he was deprived of the "defense" (Pet. 13) of showing that he used all the money in question in the form of allowable business expenses. It is no defense to a charge under Section 7206(1) to prove that, although petitioner failed to report his receipts from American Vending, he would have owed no greater tax if he had done so, because he could have offset the receipts with allowable expenses which he also failed to claim. See *Gaunt* v. *United States*, 184 F.2d 284, 288 (C.A. 1), certiorari denied, 340 U.S. 917; *Siravo* v. *United States*, 377 F.2d 469, 472-473 (C.A. 1). Cf. *Sansone* v. *United States*, 380 U.S. 343, 352, involving identical considerations under Section 7207 of the Code where, as here, an underpayment of tax or an intent to defeat a tax is not an element of the offense.[2]

2. Petitioner argues (Pet. 14-15) that he was denied a fair trial because of Special Agent Lewis' use of the word "kickback" (R. 114) in testifying before the jury. As the court of appeals suggested

[2] The reason for this rule is that where nothing is reported, the Commissioner is not even apprised of the need to verify or to investigate.

(Pet. App. 6), that term aptly described the cash payments here involved, and its use was inconsequential in any event, since the jury knew the undisputed facts concerning the payments. Furthermore, any possible prejudice to petitioner's case was cured by the trial court's prompt instruction striking the answer and directing the jury to disregard it. (R. 117.)

3. Petitioner contends (Pet. 15-16) that his statements when he was interviewed by Special Agent Lewis (R. 110-112) should have been suppressed, either because the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436, were not given or because the agent allegedly did not give the type of warning required by Internal Revenue Service directives (Pet. App. 25-26). The agent informed petitioner as required by the directives (Pet. App. 25-26) that it was his function to investigate criminal tax fraud (R. 108-109). Since the occasion was the agents "initial contact" with petitioner he fully satisfied the directive (Pet. App. 25). As to *Miranda* warnings, the other courts of appeals have held that no *Miranda* warning is required in a case such as this where the taxpayer has not been deprived of his freedom of action in any significant way. This Court has consistently refused to grant certiorari on this issue.[3]

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[3] In *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7) the Seventh Circuit required that special agents of the Internal Revenue Service give *Miranda* warnings at the outset of any investigation despite the absence of any form of cus-

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1972.

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tody, because the taxpayer might be unaware of the possible criminal implication of the inquiry. The other circuits have held to the contrary. *E.g., United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Jaskiewicz*, 433 F. 2d 415, 417-420 (C.A. 3), certiorari denied, 400 U.S. 1021; *United States* v. *Prudden*, 424 F. 2d 1021, 1025-1031 (C.A. 5), certiorari denied, 400 U.S. 831; *United States* v. *Mariani*, 422 F. 2d 150, 153-154 (C.A. 6), certiorari denied, 399 U.S. 910; *United States* v. *MacLeod*, 436 F. 2d 947 (C.A. 8), certiorari denied, 402 U.S. 907. Moreover, in the present case the agent did make known that it was his function to investigate criminal tax fraud.

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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-18

JOHN R. ENGLE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The Government's Concession That the Indictment Was Ambiguous Requires That the Petition for Writ of Certiorari Be Granted.

The Government in its Brief in Opposition for the first time, admits an ambiguity in the indictment. It concedes that the term "Total Income" is subject to at least two

meanings but, without any supporting authority, it concludes that the meaning to be attached to the term is the "ordinary meaning", the same as "total receipts" or "gross income". (Govt's Brief p. 6)

To extricate itself from the predicament thus created by the admitted ambiguity in the indictment, the Government says there is nothing to indicate that Petitioner was misled by the ambiguity, and, that in any event, if Petitioner had any doubts about the use of the term "Total Income" he should have sought clarification by way of a Bill of Particulars.

It is petitioner's position that the circumstances clearly indicate that he was misled by the use of the term "Total Income". In his own defense to the Government's evidence at trial, petitioner offered numerous witnesses which consumed one full day of trial time, corroborated by a stipulation which showed, without contradiction, that the gross amount received from American Vending was spent on business-connected entertainment and goodwill promotion. This evidence was offered for two reasons: to show lack of the requisite intent and to establish the fact that under no circumstances was the gross amount received from American Vending reportable in "Total Income" as used on Line 9, page 1. Therefore, the Government's position cannot be sustained on the mere unfounded statement that the petitioner was not misled, when the only circumstances bearing upon the subject indicate the contrary to be the case.

As to petitioner's failure to file for a Bill of Particulars, it is submitted that he should not be held to have waived any right to challenge the indictment upon appeal because he did not so move. In **Standard Oil Co. of Texas v. U.S.**, 307 F.2d 120 (C.A. 5th, 1962), the Court said:

> "While it is true that indictments are to be construed in a common sense way where one is subject equally to one of two interpretations, one of which states an offense and the other which does not, the indictment is insufficient since there is no assurance that the Grand Jury would have returned the indictment had the words been employed in a sense necessary to sustain the conviction."

Under the instant indictment, while one of the meanings of total income (gross receipts), as urged by the Government, would be sufficient to sustain the conviction, the other meaning (gross receipts less allowable deductions and expenses) as contended by Petitioner, would not.

Further, there is no rule which requires an accused to seek a clarification of an ambiguous indictment by means of a Bill of Particulars. To the contrary, in such a situation, when the indictment itself gives no independent aid to the construction of an ambiguous term, justice requires an interpretation most favorable to the defendant, so long as it is a reasonable interpretation. As was stated in **Smith v. U.S.**, 360 U.S. 1, 9 (1959):

> "The traditional canon of construction . . . calls for the strict interpretation of criminal statutes and rules in favor of defendants where substantial rights are involved."

Petitioner attached a reasonable interpretation on the indictment. The Government's position, that he was required to seek clarification, when in fact, at the preliminary stages of the proceedings, it was not apparent that clarification was needed, imposes a burden on an accused inconsistent with the principles of criminal justice.

CONCLUSION

Petitioner submits that the Government's concession as to the ambiguity in the key term of the indictment requires a full review of the issues presented by the Petition and, therefore, the Writ of Certiorari should issue.

Respectfully submitted

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